Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–54 OF 2000
SU GEOK YIAM JC
2 DECEMBER 2002

Civil Procedure *— Discovery — Application for production of documents — Whether documents were relevant — Whether order of court compelling defendants to produce documents had effect of shifting legal burden of proof from plaintiff to defendants — Whether documents likely to incriminate defendants*

Civil Procedure *— Res judicata — Decision, finality of earlier decision — Plaintiff's application for interrogatories dismissed — Subsequent application by plaintiff to compel defendants to make further and better discovery of documents — Whether doctrine of res judicata applicable in view of the earlier dismissal — Whether there were substantial and material similarities between interrogatories and documents — Whether plaintiff's subsequent application was an attempt to circumvent earlier court decision*

The plaintiff was a distributor of the Kenwood brand of electronic audio-visual equipment. The plaintiff supplied Kenwood products to the first defendant but the first defendant failed to pay for the said goods. The plaintiff then filed this action against the first defendant at the High Court to recover the purchase price of the said goods. The second, third and fourth defendants ('the three defendants') were later included as co-defendants in this action. The plaintiff's claim against the three defendants was founded on a conspiracy to defraud. The plaintiff alleged that the second and third defendants had used the first and fourth defendants to defraud the plaintiff by purchasing goods from the plaintiff under the name of the first defendant and thereafter selling the goods under the name of the fourth defendant with the payments for the goods being made to and received by the fourth defendant instead of the first defendant. The plaintiff succeeded in obtaining summary judgment against the first defendant but the judgment remained unsatisfied as the first defendant had no assets. The plaintiff was determined to pursue its claim for the sum owing from the three defendants, whom the plaintiff alleged had received the sale proceeds. On 24 November 2000, the plaintiff filed a summons for directions in encl 32 under O 25 of the Rules of the High Court 1980 to, inter alia, seek leave to serve on the three defendants interrogatories, which in the main required the three defendants to provide details of transactions involving the said goods sold by the first defendant to the fourth defendant. The deputy registrar dismissed the plaintiff's application in encl 32. The plaintiff appealed to the judge in chambers against the decision of the deputy registrar but the appeal was dismissed. In the instant application (encl 42), the plaintiff sought an order to compel the three defendants to make further and better discovery of, inter alia, invoices and delivery orders issued by the first defendant, the fourth defendant and bank statements of all the

defendants ('the said documents'). The issues to be determined in this application were whether: (a) the said documents were relevant; (b) an order of court compelling the three defendants to disclose and produce the said documents would have the effect of shifting the legal burden of proof from the plaintiff to the three defendants; (c) the three defendants should be compelled to disclose and produce for inspection the said documents on the ground that the said documents were within their special knowledge although the documents were likely to incriminate them; and (d) the doctrine of res judicata was applicable in view of the earlier order by the judge in chambers.

Held, dismissing the plaintiff's application:

(1) Although the said documents concerned were relevant to show whether the fourth defendant had received payment for the said goods, the said documents were not relevant to the plaintiff's cause of action for conspiracy to defraud against the three defendants because there was no material advanced by the plaintiff other than allegations that the said documents would show that the three defendants intended to use the veil of incorporation of the first defendant to acquire the said goods from the plaintiff and use the fourth defendant as a vehicle to sell the goods with the object of defrauding or cheating the plaintiff (see p 287F–G); *Gamlen Chemical Co (UK) Ltd v Rochem Ltd & Ors* [1983] RPC 1 distinguished.

(2) An order of court compelling the three defendants to disclose and produce the said documents for inspection by the plaintiff would have the effect of shifting the legal burden of proving conspiracy to defraud from the plaintiff to the three defendants (see p 287G–H); *Mary Ng v R* [1958] AC 173 followed; *R v Edwards* [1974] 2 All ER 1085distinguished.

(3) Although the said documents were specially within the knowledge of the three defendants, the plaintiff's application should not be granted because the documents were likely to incriminate them (see p 288A).

(4) The doctrine of res judicata was applicable because there were substantial and material similarities between the interrogatories and the said documents and the plaintiff's instant application was an attempt to circumvent the earlier decision of the judge in chambers (see p 288B).

[Bahasa Malaysia summary

Plaintif adalah pengedar peralatan audio-visual elektronik Kenwood. Plaintif telah membekalkan produk Kenwood kepada defendan pertama tetapi defendan pertama telah gagal untuk membayar untuk barangan tersebut. Plaintif telah memfailkan tindakan ini terhadap defendan pertama di Mahkamah Tinggi untuk mendapat balik harga

belian barangan tersebut. Defendan-defendan kedua, ketiga dan keempat ('ketiga-tiga defendan tersebut') telah dimasukkan sebagai defendan-defendan bersama dalam tindakan ini. Tuntutan plaintif terhadap ketiga-tiga defendan tersebut berdasarkan satu konspirasi untuk menipu. Plaintif telah mengatakan bahawa defendan-defendan kedua dan ketiga telah menggunakan defendan-defendan pertama dan keempat untuk menipu plaintif dengan membeli barangan daripada plaintif di bawah nama defendan pertama dan kemudian menjual barangan tersebut di bawah nama defendan keempat di mana pembayaran untuk barangan tersebut dibuat kepada dan diterima oleh defendan keempat dan bukan defendan pertama. Plaintif telah berjaya memperoleh penghakiman terus terhadap defendan pertama tetapi penghakiman tersebut masih tidak diselesaikan kerana defendan pertama tiada aset. Plaintif bernekad untuk meneruskan tuntutannya untuk jumlah yang perlu dibayar daripada ketiga-tiga defendan tersebut, yang mana plaintif mengatakan telah menerima hasil jualan tersebut. Pada 24 November 2000, plaintif telah memfailkan satu saman untuk arahan dalam lampiran 32 di bawah A 25 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk, antara lain, memohon kebenaran untuk menyampaikan interogatori ke atas ketiga-tiga defendan tersebut, yang utamanya menghendaki ketiga-tiga defendan tersebut mengemukakan butir-butir transaksi yang melibatkan barangan yang dijual oleh defendan pertama kepada defendan keempat tersebut. Timbalan pendaftar telah menolak permohonan plaintif dalam lampiran 32. Plaintif telah merayu kepada hakim dalam kamar terhadap keputusan timbalan pendaftar tersebut tetapi rayuan tersebut telah ditolak. Dalam permohonan sekarang (lampiran 42), plaintif memohon satu perintah untuk memaksa ketiga-tiga defendan tersebut mengemukakan, antara lain, invois-invois dan pesanan hantaran yang dikeluarkan oleh defendan pertama, defendan keempat dan penyata-penyata bank untuk semua defendan-defendan ('dokumen-dokumen tersebut'). Persoalan-persoalan yang perlu ditentukan dalam permohonan ini adalah sama ada: (a) dokumen-dokumen tersebut adalah relevan; (b) satu perintah mahkamah yang memaksa ketiga-tiga defendan tersebut untuk mendedah dan mengemukakan dokumen-dokumen tersebut akan memberi kesan mengalih beban bukti di sisi undang-undang daripada plaintif kepada ketiga-tiga defendan tersebut; (c) ketiga-tiga defendan tersebut terpaksa mendedah dan mengemukakan untuk siasatan dokumen-dokumen tersebut atas alasan bahawa dokumen-dokumen tersebut adalah dalam pengetahuan khas mereka walaupun dokumen-dokumen tersebut mungkin akan menunjukkan bahawa mereka bersalah; dan (d) doktrin res judicata terpakai memandangkan perintah terdahulu oleh hakim dalam kamar.

Diputuskan, menolak permohonan plaintif:

(1) Walaupun dokumen-dokumen tersebut yang berkaitan adalah relevan untuk menunjukkan sama ada defendan keempat telah

menjual barangan tersebut dan menerima bayaran untuk barangan tersbeut, dokumen-dokumen tersebut tidak relevan kepada kausa tindakan plaintif untuk konspirasi menipu terhadap ketiga-tiga defendan tersebut kerana tiada bahan telah dikemukakan oleh plaintif selain daripada pengataan bahawa dokumen-dokumen tersebut akan menunjukkan bahawa ketiga-tiga defendan tersebut berniat untuk menggunakan litupan korporat defendan pertama untuk memperoleh barangan tersebut daripada plaintif dan menggunakan defendan keempat sebagai alat untuk menjual barangan tersebut dengan tujuan menipu atau memperdayakan plaintif (lihat ms 287F–G); *Gamlen Chemical Co (UK) Ltd v Rochem Ltd & Ors* [1983] RPC 1 dibeza.

(2) Satu perintah mahkamah yang memaksa ketiga-tiga defendan tersebut untuk mendedah dan mengemukakan dokumen-dokumen tersebut untuk siasatan oleh plaintif akan memberi kesan mengalih beban bukti di sisi undang-undang untuk membuktikan konspirasi untuk menipu daripada plaintif kepada ketiga-tiga defendan tersebut (lihat ms 287G–H); *Mary Ng v R* [1958] AC 173 diikut; *R v Edwards* [1974] 2 All ER 1085 dibeza.

(3) Walaupun dokumen-dokumen tersebut secara khususnya dalam pengetahuan ketiga-tiga defendan tersebut, permohonan plaintif tidak patut dibenarkan kerana dokumen-dokumen tersebut mungkin akan menunjukkan bahawa mereka bersalah (lihat ms 288A).

(4) Doktrin res judicata adalah terpakai kerana wujud persamaan yang banyak dan penting antara interogatori dan dokumen-dokumen tersebut dan permohonan plaintif sekarang adalah satu percubaan untuk memintasi keputusan terdahulu hakim dalam kamar tersebut (lihat ms 288B).]

Notes

For cases on application for production of documents, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2057–2062.

For cases on finality of earlier decision, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5102–5118.

Cases referred to

Compagnie Financiere et Commerciale du Pacifique, The v Peruvian Guano Co, The [1882] 1 QBD 55 (refd)

Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd 1981] 1 MLJ 105 (refd)

Format Communications Mfg Ltd v ITT (United Kingdom) Ltd [1983] FSR 473 (refd)

Gamlen Chemical Co (UK) Ltd v Rochem Ltd [1983] RPC 1 (distd)

Ho Tong Cheong & Ors v Oversea-Chinese Banking Corpn Ltd [1967] 2 MLJ 70 (refd)

Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International) [1990] 2 MLJ 282 (refd)
Mary Ng v The Queen [1958] AC 173 (folld)
R v Edwards [1974] 2 All ER 1085 (distd)
Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd [1997] 5 MLJ 121 (refd)
Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener) [1992] 2 MLJ 434 (refd)
Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 KB 395 (refd)

Legislation referred to

Evidence Act 1950 ss 106, 109
Rules of the High Court 1980 O 24, O 25

K Shanmuga (Kanesalingam & Co) for the plaintiff.
Clement Cheng Yew Min (John Heah & Co) for the defendants.

Su Geok Yiam JC: Enclosure 42 is an application by the plaintiff vide a summons in chambers filed on 7 November 2001 to compel the second, third and fourth defendants to make further and better discovery of documents in favour of the plaintiff.

Grounds of the plaintiff's application

The plaintiff's application is made pursuant to O 24 of the Rules of the High Court 1980 ('the RHC'). The grounds of the application are that in the light of the allegation by the plaintiff of fraud on the part of the second, third and fourth defendants, the second, third and fourth defendants have not disclosed in their list of documents filed on 18 October 2001 (encl 40) ('the said list of documents') documents relating to the issue of whether or not the fourth defendant sold Kenwood audio-visual equipment originally supplied by the plaintiff to the first defendant for sale only to retailers between the months of November 1997 and April 1998 ('the said goods'). The plaintiff alleges that there is evidence that such documents exist or did exist and that the second, third and fourth defendants have knowingly omitted to disclose such documents in the said list of documents.

The plaintiff also relies on the following grounds as contained in its affidavit in support (encl 42A) and affidavit in reply (encl 43) affirmed on 2 November 2001 and 4 January 2002 respectively, by Yap Kim Yin, the administrative manager of the plaintiff, and filed on 7 November 2001 and 12 January 2002 respectively, and the affidavit (encl 14) affirmed by Teh Seng Teong, on 12 November 1998 and filed on 12 November 1998 to support the plaintiff's application (encl 15) to join the second, third and fourth defendants as co-defendants:

(1) the plaintiff believes that a limited liability company such as the fourth defendant in this action, carrying on business as traders, would in the normal course of its business of buying and selling goods have or had

A at sometime in their possession, custody or power a copy of the documents or the classes of documents specified in the schedule attached to the plaintiff's summons in chambers (encl 42) being the usual documents generated by all dealers in the usual and ordinary course of business when dealing with the sale and purchase of goods;

B (2) the plaintiff believes that the second and third defendants who are the only directors of the first and fourth defendants have acted fraudulently because they have not disclosed two documents in the said list of documents, to wit, a delivery order No 8527 dated 7 March 1998 issued by the fourth defendant to M/s Star Electric Sales & Service Sdn Bhd of Jalan Batu Uban, Pulau Pinang and an invoice C No 8404 dated 14 April 1998 issued by the fourth defendant to M/s Hock Loong Electrical & Credit of 497–501, Jalan Pasir Puteh, 31650 Ipoh (exhs 'TS-5' and 'TS-6', encl 13);

(3) the plaintiff believes that based on the two documents described in sub-para (2) above and other documents in the possession, custody and power of the fourth defendant, the fourth defendant which was D previously a wholesaler of Kenwood audio-visual equipment and because of the goodwill it enjoyed, continued to sell and to receive payment for the said goods;

(4) the third defendant in para 4 of his affidavit verifying the said list of documents affirmed on 18 October 2001 and filed on the same date E (encl 41) has failed to verify the truth of para 5 of the said list of documents (encl 40) which states that he does not have nor previously had in his possession, custody or power any documents relating to the action other than the documents specified in the said list of documents (encl 40);

F (5) the plaintiff believes that based on the advice of the plaintiff's solicitors and s 106 of the Evidence Act 1950 what became of the said goods is solely within the knowledge of the second and third defendants being directors of the first defendant and cannot possibly be known by any of the plaintiff's servants, officers or agents and therefore, the second and third defendants bear the evidential burden and must disclose G those facts or documents in order to enable the plaintiff to fulfil its legal burden of proving those facts and documents;

(6) the documents sought for by the plaintiff are very relevant to the plaintiff because the documents comprise the evidence needed to prove the facts relating to the plaintiff's allegation of fraud against the second, third and fourth defendants and the state of mind of the H second and third defendants and must be disclosed, no matter how numerous;

(7) the plaintiff denies that its application is an attempt to circumvent the decision of Md Raus J in respect of the plaintiff's application for interrogatories;

I (8) the plaintiff believes that its application for interrogatories was dismissed on the ground that the interrogatories were prolix and too numerous to answer; and

(9) the plaintiff believes that the second and third defendants used the separate legal entities of the first and fourth defendants which they control in order to evade their contractual liabilities, to defraud their creditors by obtaining goods without paying for them and setting up a scheme whereby they cannot in the ordinary way be successfully sued for payment.

In their affidavit in reply affirmed by the second defendant on 26 December 2001 and filed on 27 December 2001 (encl 44), the second, third and fourth defendants:

(1) deny that the documents sought for by the plaintiff which the plaintiff says show to whom and the manner in which the defendants sold the said goods are relevant to the plaintiff's cause of action which is conspiracy by the second, third and fourth defendants to defraud the plaintiff because the plaintiff must prove that the second, third and fourth defendants had the intention right from the very beginning to defraud the plaintiff and that the defendants never had the intention to pay for the goods in the first place;

(2) say that such documents are only relevant if the plaintiff's claim is for the repossession or recovery of the said goods;

(3) say that s 109 of the Evidence Act 1950 is inapplicable and that the plaintiff cannot shift its burden of proof to the second, third and fourth defendants in order to prove the plaintiff's claim; and

(4) say that the plaintiff's application is oppressive and an abuse of the process of the court because the plaintiff's summons in chambers filed on 24 November 2000 for leave to serve on the defendants interrogatories concerning the whereabouts of the said goods was dismissed by the learned deputy registrar on 23 June 2001 and the plaintiff's appeal to the judge in chambers was dismissed with costs on 8 October 2001, and the plaintiff has appealed to the Court of Appeal and that the plaintiff's application is not bona fide being an attempt to circumvent the decisions of the deputy registrar and the learned judge.

Facts and background

The facts and background of the case are as follows.

The plaintiff is the Malaysian sub-distributor of a Japanese multinational manufacturer and seller of electronic equipment, and sells the Kenwood brand of electronic audio-visual equipment. The first defendant is a limited company. The first defendant had agreed with the plaintiff to sell the said goods to retailers and to pay the plaintiff the wholesale price from the proceeds of sale. The first defendant failed to pay the plaintiff on the expiry of the 60 days' credit period and thereafter despite demands from the plaintiff, in particular, a notice of demand dated 12 March 1998. The plaintiff's claim filed on 24 April 1998 in the Shah Alam High Court against the first defendant is for a sum of RM1,146,681.18 ('the said sum') being the purchase price for the said goods together with interest thereon at 8% pa from 1 April 1998 until full realization and costs of the action.

A The plaintiff has set out the particulars of the respective invoice dates, invoice/credit note numbers, the breakdown of the said sum and the delivery order numbers in its statement of claim. The first defendant entered appearance on 11 June 1998 (encl 2).

On 18 June 1998, the first defendant through its solicitors, Messrs B Syarikat Ng & Anuar, filed its statement of defence (encl 3). In its statement of defence, the first defendant denied the debt, and without condescending to particulars, contended the goods did not possess written warranties, were of unmerchantable quality, were unfit for their purposes, not according to the agreed specifications and were defective resulting in the first defendant's customers returning the goods thereby causing the first defendant to suffer C loss. The first defendant also denied receiving the plaintiff's notice of demand in respect of the said sum or, alternatively, that the notice of demand was invalid because the plaintiff's claim was unfounded.

On 24 September 1998, the first defendant applied vide a summons in chambers (encl 9) for the action to be transferred to the Penang High D Court.

On 13 November 1998, the plaintiff applied vide a summons in chambers (encl 15) which was allowed by the court on 8 April 1999, to include the second, third and fourth defendants as co-defendants in this action. The grounds as stated in the plaintiff's supporting affidavit E (encl 14), affirmed by Teh Seng Teong, the plaintiff's general manager, on 12 November 1998 are, inter alia, that the second and third defendants who are directors of the first defendant, cannot agree with each other, the second and third defendants are also the directors of the fourth defendant, they own 50% of the shares in the fourth defendant, whilst the fourth defendant in turn owns 90% of the shareholding in the first defendant, both the first F and fourth defendants also have the same business address, there is no intention whatsoever on the first defendant's part to settle the plaintiff's claim and more, importantly, that the two directors are engaged in a conspiracy to defraud the plaintiff in the said sum and that the two directors are making use of the fourth defendant to sell the said goods to various dealers of Kenwood audio-visual equipment. The plaintiff exhibited copies G of a delivery order and an invoice issued by the fourth defendant to two dealers of Kenwood audio-visual equipment to support the plaintiff's allegation that the two directors had adopted a fraudulent scheme whereby they purchased the said goods in the name of one limited liability company, ie the first defendant, and sold the said goods in the name of another limited liability company, ie the fourth defendant, in order to avoid paying for the H said goods by hiding behind the veil of incorporation of the first defendant. The plaintiff also exhibited the search reports (exhs 'TST-3' and 'TST-4') from the Registry of Companies.

On 13 April 1999, the plaintiff filed an amended statement of claim (encl 22). In the amended statement of claim, the plaintiff, in addition to its I claim against the first defendant for goods sold and delivered, further claimed for the said sum against the second, third and fourth defendants founded on a conspiracy to defraud pursuant to which the second and third

defendants used the first and fourth defendants to defraud the plaintiff by purchasing goods from the plaintiff under the name of the first defendant and thereafter selling the goods under the name of the fourth defendant with the payments for the goods being made to and received by the fourth defendant instead of by the first defendant. A

In view of the denials of the first defendant and its unsustainable defences, it was hardly surprising when on 7 May 1999, the plaintiff succeeded in obtaining summary judgment against the first defendant for the said sum together with interest thereon at the rate of 8% and costs. However, since the judgment remains unsatisfied and according to the plaintiff, the first defendant has no assets, the plaintiff is determined to pursue its claim for the said sum against the second, third and fourth defendants whom the plaintiff alleges have received the proceeds from the sale of the said goods by the fourth defendant, either by cheque or in cash, although the invoices were issued in the name of the fourth defendant. B C

On 19 May 1999, the second, third and fourth defendants entered their appearance. On 16 June 1999, the second, third and fourth defendants filed their statement of defence. In the statement of defence (encl 26), the fourth defendant denies owing the plaintiff the said sum, denies it bought or sold the said goods, denies that it is the principal or undisclosed principal of the first defendant and states that it is a former dealer of the plaintiff with whom the plaintiff had no further dealings after the appointment of the first defendant as a wholesaler. D E

Plaintiff's summons for directions

On 24 November 2000, the plaintiff filed a summons for the following directions (encl 32) under O 25 of the RHC: F

(12) the plaintiff shall within 21 days serve on the defendant a list of documents and file an affidavit verifying such list;

(13) the defendants shall within 21 days serve on the plaintiff a list of documents and file an affidavit verifying such list;

(14) inspection of documents shall be carried out after service of the lists of documents; G

(15) the plaintiff shall have leave to serve on the second, third and fourth defendants the interrogatories as shown in the accompanying documents, and that the second, third and fourth defendants shall answer the interrogatories by way of affidavit within 21 days;

(28) the trial is estimated to take 4 days with 10 witnesses and the action shall be set down for trial within 120 days; and H

(29) the costs of the application shall be costs in the cause.

The second, third and fourth defendants objected to the plaintiff's prayer in item 15 of the summons for directions in respect of the interrogatories which covered 18 pages and which in the main requires the second, third and fourth defendants to provide details of the transactions involving the said goods sold by the first defendant to the fourth defendant on the ground I

A that the intended interrogatories were unreasonable and vexatious as the answers to the interrogatories will put the second, third and fourth defendants in an oppressive position.

On 23 June 2001, the learned deputy registrar dismissed the plaintiff's prayer in item 15 of the plaintiff's summons for direction with costs. The B plaintiff appealed against the decision of the learned deputy registrar to the judge in chambers. On 8 October 2001, Md Raus J dismissed the plaintiff's appeal with costs.

Plaintiff's instant application for further and better discovery of documents

C In the instant application, the plaintiff is seeking an order of the court to compel the second, third and fourth defendants to list, verify and produce the following documents:

(1) all invoices and delivery orders or office copies of all invoices and delivery orders issued by the first defendant for sale and/or conveyance by the first defendant of the said goods; D

(2) all invoices and delivery orders or office copies of all invoices and delivery orders issued by the fourth defendant for the sale and/or conveyance by the fourth defendant of the said goods sold or conveyed by the fourth defendant;

(3) the receipt books or copies of receipts issued by the first, second, third E and/or fourth defendants and their servants, officers and/or agents for payments received from the sale of the said goods;

(4) bank statements of the first, second, third and fourth defendants for the period of 24 months from the first date of purchase of the said goods by the first defendant from the plaintiff which occurred on or F about 13 October 1997;

(5) inventory records for the said goods stored by the defendants or any of them; and

(6) any record made of the said goods purchased from the plaintiff by the first defendant specifying the make and serial number which remain G unsold and which remain in the possession, custody or power of the defendants or any of them.

Submissions of the plaintiff's counsel

Mr K Shanmuga, the learned counsel for the plaintiff, has submitted that H first, the documents concerned are extremely relevant and highly probative and must be disclosed as provided for in O 24 of the RHC and as decided in a number of cases, viz, *Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981] 1 MLJ 105; *The Compagnie Financiere Et Commerciale Du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55; *Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd* [1997] 5 MLJ 121; *Manilal & Sons* I *(Pte) Ltd v Bhupendra Kȳ Shan (t/a ȳB International)* [1990] 2 MLJ 282 (Singapore); and *Format Communications Mfg Ltd v ITT (United Kingdom) Ltd* (1983) FSR 473.

Secondly, the plaintiff needs the documents which comprise the complete sales records of the subsequent re-sale of the said goods by the fourth defendant in order to prove its claim founded on fraud against the second, third and fourth defendants fully. The second and third defendants have made a handsome profit (or loot) for themselves by cheating the plaintiff who dealt with them in good faith. The bank statements of the fourth defendant will show how much the second and third defendants have personally pocketed, if the plaintiff's allegations are true. The defendants have not credibly denied the existence of these documents. He relies on s 14 of the Evidence Act 1950 and the case of *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1983] RPC 1.

Thirdly, these documents are in the exclusive control of the defendants. He relies on s 106 of the Evidence Act 1950 and the case of *Ho Tong Cheong & Ors v Oversea-Chinese Banking Corpn Ltd* [1967] 2 MLJ 70 (Singapore). These documents are relevant to the plaintiff's claim in order to prove facts which have been put in issue by the defendants themselves even if the documents are damaging to the defendants' case. If the defendants fail to produce these documents then the s 114(g) presumption in the Evidence Act 1950 must be applied against them. The decision of Md Raus J dismissing the plaintiff's application for interrogatories, was made in error and being only an interlocutory decision is capable of revocation or amendment by this court and the issue of res judicata does not arise. Alternatively, the application that was dismissed related to interrogatories whereas the instant application is for further and better discovery of documents. He relies on O 26 r 9 of the RHC, pp 132–134 of the book *The Doctrine of Res Judicata* (2nd Ed, 1967) (Butterworths, London) by Sir Alexander Kingcome Turner, the decision of Edgar Joseph Jr J (as his Lordship then was) in *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434, and the grounds of judgment of Md Raus J.

Submissions of the second, third and fourth defendants' counsel

Mr Clement Cheng, the learned counsel for the second, third and fourth defendants, submitted that in cases involving fraud, the burden of proof is on the plaintiff to prove fraud on the part of the second, third and fourth defendants and not for the second, third and fourth defendants to prove fraud on their part. Since the plaintiff has in its possession the two documents (exhs 'TST-5' and 'TST-6', encl 13), they should proceed to use them to prove fraud against the second, third and fourth defendants and not go by way of discovery for other documents in order to prove fraud against the second, third and fourth defendants. He also submitted that what the plaintiff is requesting in the instant application has already been disallowed by the learned deputy registrar and confirmed by Md Raus J. He explained that prayer (i) of encl 42 is in substance similar to prayer 1 of the intended interrogatories (encl 32). There are also other similarities between the prayers in encl 42 and the prayers in the intended interrogatories (encl 32). He further submitted that the plaintiff's application is an attempt to circumvent the decision of the learned judge which is pending appeal.

Issues for the court's determination

In order to dispose of the instant application, the court has to consider and decide the following issues:

(1) whether the documents concerned are relevant;

(2) whether an order of court compelling the plaintiff to disclose and produce the documents concerned for inspection would have the effect of shifting the legal burden of proof from the plaintiff to the second, third and fourth defendants;

(3) whether the second, third and fourth defendants should be compelled to disclose and produce for inspection the documents concerned on the ground that the documents are within their special knowledge although the documents are likely to incriminate them; and

(4) whether the doctrine of res judicata is applicable here in view of the earlier order of Md Raus J dismissing the plaintiff's appeal against the decision of the learned deputy registrar in respect of the plaintiff's application for interrogatories.

Decision of the court

On 9 September 2002, after hearing oral submissions from both the learned counsel and having considered the written submissions of the parties and the authorities cited by them, the court dismissed the plaintiff's application (encl 42) with costs.

The court did so because of the following reasons.

In respect of the first issue, the court is satisfied that although the documents concerned are relevant to show whether the fourth defendant sold the said goods and received payment for the said goods, the documents are not relevant to the plaintiff's cause of action for conspiracy to defraud against the second, third and fourth defendants because there is no material advanced by the plaintiff other than allegations that the documents concerned will show that the second, third and fourth defendants intended from the very beginning to use the veil of incorporation of the first defendant to acquire the said goods from the plaintiff and to use the fourth defendant as a vehicle in order to sell the said goods with the object of defrauding or cheating the plaintiff. *Gamlen* is, therefore, distinguishable on its facts.

In respect of the second issue, the court is satisfied that an order of court compelling the second, third and fourth defendants to disclose and produce the documents concerned for the inspection of the plaintiff would have the effect of shifting the legal burden of proof, ie to prove conspiracy to defraud, from the plaintiff to the second, third and fourth defendants. It is trite that the legal burden of proof rests throughout on the plaintiff. The case of *Mary Ng v The Queen* [1958] AC 173 is applicable. The case of *R v Edwards* [1974] 2 All ER 1085 is inapplicable because the case deals with the shifting of the legal burden of proof where the law prohibiting the act also makes the prohibition subject to a proviso, exception, excuse or qualification.

In respect of the third issue, the court is satisfied that the plaintiff's application should not be granted although the documents are specially within the knowledge of the second, third and fourth defendants because the documents are likely to incriminate the second, third and fourth defendants (see the case of *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.)

In respect of the fourth issue, the court is satisfied that the doctrine of res judicata is applicable because there are substantial and material similarities between the intended interrogatories and the documents concerned and that the plaintiff's application is an attempt to circumvent the decision of Md Raus J.

Plaintiff's application dismissed.

Reported by Lim Lee Na